Sridhar a/l Arunasalam v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-06A-2 OF 2005
KN SEGARA, ABU SAMAH JJCA AND ABDUL WAHAB PATAIL
22 JULY 2009

Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Dangerous drugs found in bag carried by appellant — Whether trial judge erred in finding that appellant had actual knowledge of drugs found in bag upon arrest — Whether trial judge failed to consider appellant's cautioned statement — Whether prosecution wrongly invoked presumption under s 37(da) of the Act to establish trafficking — Dangerous Drugs Act 1952 ss 37(d), 37(da) & 39B(1)

Acting on information received, a police team ('the team') led by Chief Inspector Roslan bin Hussin ('the CI') had conducted an observation of a McDonald's restaurant in Kuala Lumpur ('the restaurant'). On arrival at the restaurant the team split into three groups with the group headed by the CI positioned at the first floor of the restaurant. During that surveillance the team had observed Sridhar a/l Arunasalam ('the appellant'), entering the restaurant carrying a red bag ('the bag') slung over his shoulder. The CI and his team identified themselves to the appellant and pounced on him so as to prevent him from running away. When the bag that the appellant was carrying was searched it was found to contain a green bag which in turn contained a box in which there was six newspaper packages that contained a substance, which was later confirmed by the chemist to be 200.2g of a mixture of heroin and monoacetylmorphines. The appellant was charged for trafficking in dangerous drugs, under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). When the case came to trial, the trial judge found that the prosecution had succeeded in proving that the appellant had exclusive custody and control of the drugs and that he had knowledge of the drugs without invoking the presumption under s 37(d) of the DDA. The appellant was charged and convicted for the offence of trafficking in 200.2g of dangerous drugs and sentenced to death. This was the appellant's appeal against that conviction and sentence.

Held, allowing the appeal:

(1) Although the appellant had custody and control of the bag at the time of his arrest, there was no unequivocal evidence that he had knowledge of the drugs inside the box found in the bag. There was no evidence as to who had placed the green bag with its contents into the bag the appellant was carrying. In this circumstances, the trial judge had seriously erred and

misdirected himself at the close of the prosecution's case in finding that the appellant had actual knowledge of the drugs found in the box upon his arrest (see paras 10–11).

(2) In his cautioned statement, made about 17 hours after his arrest, the appellant had stated that he had been paid to deliver a box containing a handphone but that he did not see what was inside the box. The appellant had also stated the names of the persons who had asked him to deliver the box and given him the box. However, the trial judge failed to consider adequately the appellant's cautioned statement upon which no investigations were carried out by the investigating officer to ascertain the existence of the persons referred to therein. This court found that the appellant's cautioned statement although brief was illuminating as to the appellant's actual knowledge, if any, of the drugs found at the time of his arrest and that if the statement had been adequately considered in the totality of the evidence at the close of the prosecution's case no reasonable person would have concluded that the appellant had actual knowledge of the drugs inside the box in the bag (see paras 12–14).

(3) The prosecution should not have invoked the presumption under s 37(da) of the DDA to establish the element of trafficking as there was no evidence of any actual trafficking by the appellant. There was no transaction at all in the drugs by the appellant at the restaurant. However, as there was prima facie evidence that the appellant had custody and control of the bag he was carrying and consequently of all the contents therein he was deemed to be in possession of the drugs. As the amount of drugs in the appellant's possession was substantial he was sentenced to 17 years of imprisonment from the date of arrest and ten strokes of the rotan (see paras 18–19 & 21).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima, sepasukan polis ('pasukan') yang diketuai oleh Cif Inspektor Roslan bin Hussin ('CI') telah menjalankan pemerhatian ke atas sebuah restoran McDonald's di Kuala Lumpur ('restoran tersebut'). Setibanya di restoran tersebut, pasukan berpecah kepada tiga kumpulan dengan kumpulan yang diketuai oleh CI berada di tingkat pertama restoran. Semasa pengawasan, pasukan telah melihat Sridhar a/l Arunasalam ('perayu'), memasuki restoran membawa sebuah beg merah ('beg') tersangkut pada bahunya. CI dan pasukannya mendedahkan diri mereka kepada perayu dan menerkamnya untuk menghalangnya daripada melarikan diri. Apabila beg perayu diperiksa, ia didapati mengandungi beg hijau yang mengandungi kotak di mana terdapat enam bungkusan akhbar yang mengandungi bahan yang kemudiannya disahkan oleh ahli kimia sebagai 200.2g campuran heroin dan *monoacetylmorphines*. Perayu telah dituduh kerana mengedar dadah berbahaya, di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Apabila kes mula dibicarakan, hakim bicara mendapati bahawa pihak pendakwaan telah berjaya

membuktikan bahawa perayu mempunyai jagaan dan kawalan eksklusif ke atas dadah tersebut dan bahawa dia mempunyai pengetahuan tentang dadah, tanpa membangkitkan anggapan di bawah s 37(d) ADB. Perayu telah dituduh dan disabitkan atas kesalahan mengedar 200.2g dadah berbahaya dan dihukum mati. Ini adalah rayuan perayu terhadap sabitan dan hukuman tersebut.

Diputuskan, membenarkan rayuan:

(1) Walaupun perayu mempunyai jagaan dan kawalan beg itu semasa dia ditangkap, tiada bukti tidak bercanggah bahawa dia mempunyai pengetahuan dadah di dalam kotak yang dijumpai dalam beg. Tiada keterangan mengenai siapa yang telah meletakkan beg hijau berserta kandungannya ke dalam beg yang dibawa oleh perayu. Dalam hal keadaan ini, hakim bicara telah terkhilaf dan tersalah arah dirinya di akhir kes pendakwaan apabila beliau memutuskan bahawa perayu mempunyai pengetahuan sebenar dadah yang dijumpai di dalam kotak ketika dia ditangkap (lihat perenggan 10–11).

(2) Dalam satu pernyataan beramaran beliau, yang dibuat kira-kira 17 jam selepas dia ditangkap, perayu telah menyatakan bahawa dia telah dibayar untuk menghantar sebuah kotak yang mengandungi telefon bimbit tetapi dia tidak melihat apa yang ada di dalam kotak. Perayu juga telah menyatakan nama-nama orang yang telah meminta beliau menghantar kotak dan memberikan kotak kepadanya. Walau bagaimanapun, hakim bicara telah gagal mempertimbangkan secukupnya pernyataan beramaran perayu yang mana tiada siasatan telah dijalankan oleh pegawai penyiasat untuk memastikan kewujudan orang-orang yang disebut di dalamnya. Mahkamah mendapati bahawa pernyataan beramaran perayu, walaupun ringkas, menunjukkan pengetahuan sebenar perayu, jika ada, mengenai dadah yang dijumpai ketika tangkapannya dan bahawa jika kenyataan itu telah secukupnya dipertimbangkan dalam keseluruhan bukti di akhir kes pendakwaan, tiada orang munasabah yang akan membuat kesimpulan bahawa perayu mempunyai pengetahuan sebenar akan dadah di dalam kotak di dalam beg (lihat perenggan 12–14).

(3) Pihak pendakwaan tidak seharusnya membangkitkan anggapan di bawah s 37(da) ADB untuk mewujudkan elemen penyeludupan kerana tiada keterangan mengenai sebarang penyeludupan sebenar oleh perayu. Tiada urus niaga sama sekali berkenaan dadah, oleh perayu, di dalam restoran. Walau bagaimanapun, oleh kerana terdapat keterangan prima facie bahawa perayu mempunyai jagaan dan kawalan beg yang dibawanya dan akibatnya, semua isi kandungan di dalamnya disifatkan sebagai memiliki dadah. Memandangkan jumlah dadah dalam milikan perayu adalah besar, dia dijatuhkan hukuman 17 tahun penjara dari tarikh tangkapan dan sepuluh kali sebatan (lihat perenggan 18–19 & 21).]

Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue paras 191–274.

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), 37(d), 37(d)(iiia), (da), 39B(1)(a), 39B(2)

Appeal from: Criminal Trial No 46–22 of 2002 (High Court, Kuala Lumpur).

Gurbachan Singh s/o Bagawan Singh (Bachan & Kartar) for the appellant.
Saiful Edris bin Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

KN Segara JCA:

[1] The appellant was charged and convicted for the offence of trafficking in 200.2g of dangerous drugs (120.8g heroin and 79.4g monoacetylmorphines) on 22 September 2003, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act') and punishable under s 39B(2) of the Act. He was sentenced to death at the High Court, Kuala Lumpur on 25 February 2005. This appeal is against the conviction and the mandatory death sentence.

[2] Briefly, the facts are as follows.

[3] On 22 September 2003, upon information received, C/I Roslan bin Hussin ('SP4') led a team of 12 police officers in mufti at about 6.45pm to make observation and execute an ambush at the McDonald's Restaurant, Jalan Pahang, Kuala Lumpur because a drug trafficking *transactio*n was to take place. SP4 stated in cross-examination:

> Punca operasi ini ialah satu maklumat dadah yang diterima oleh saya,iaitu seorang lelaki India akan *menjalankan transaksi* pengedaran dadah di kawasan McDonalds Titiwangsa. Saya tidak pasti transaksi itu diantara siapa. Pemberi maklumat itu tidak terlibat dalam transaksi itu.

(Emphasis added.)

[4] At the very outset we observe and emphasise that any 'transaction' must involve the participation of more than one person. It is in this context and the alleged information received by C/I Roslan that the charge against the appellant must be viewed, to determine the culpability of the appellant for an offence that carries the mandatory death penalty. Further, the well settled principles in criminal law that an accused must be accorded the benefit of any inference favorable to him from a given set of facts must be strictly adhered to

and the prosecution cannot shirk its responsibility to prove its case beyond a reasonable doubt by invoking any adverse inferences from the said facts, to establish any ingredient of the offence.

[5] We shall continue to proceed with the salient facts of the prosecution's case against the appellant. On arrival at the restaurant at about 6.45pm C/I Roslan split his team into three groups. The first group, headed by C/I Roslan, positioned themselves at the first floor of the restaurant, the second group at the ground floor whilst the third group was positioned outside of the restaurant. *There were no customers on the first floor*.

[6] At about 7.15pm C/I Roslan saw a male Indian, wearing a blue helmet and carrying a red bag slung on his shoulders, enter the restaurant on foot and proceeded straight to the first floor. C/I Roslan and his team dashed towards him and identified themselves as police. He was pounced upon and the police allege he attempted to run away. A struggle ensued and then he was arrested. The red bag was still with him. The police asserted that he had not at any time thrown it away. He was not told why he was arrested. The male Indian was identified as the appellant.

[7] C/I Roslan examined the red bag on the first floor of the restaurant in the presence of the appellant. He appeared frightened and panicky. C/I Roslan testified:

S: Apa reaksinya semasa pemeriksaan itu?

J: Dia kelihatan takut.

[8] Inside the red bag (P9) was a green bag. Inside the green bag (P10) was a box (P11) with the brand name 'Nike'. Inside the box were six Chinese newspaper packages and inside each of the packages was a clear plastic package containing powdery substance suspected to be heroin. The powdery substance was analysed by the chemist and was confirmed to be dangerous drugs weighing 200.2g — a mixture of heroin and monoacetylmorphines, as set out in the charge.

[9] At the close of the case for the prosecution the learned trial judge came to the conclusion that the prosecution had proved that the appellant had exclusive custody and control of the drugs and that he had knowledge of the said drugs. The learned judge did not invoke the presumption under s 37(d) of the Act to establish the appellant had possession of the drugs. Section 37(d) reads:

(d) any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be

deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

[10] There is no doubt that the appellant had custody and control of the red bag slung over his shoulder at the time of his arrest. However, there was no unequivocal evidence that the appellant had knowledge of the drugs in each of the six plastic packets wrapped in Chinese newspaper found inside the box in the green bag discovered inside the red bag. There was no evidence as to who had packed the six packages inside the box. There was no evidence outside or inside the box to link it in any way with the appellant. There was no evidence as to who had placed the box inside the green bag. There was no evidence as to who had placed the green bag with its contents into the red bag. It is indisputable that the contents of the box are not visible without X-ray vision to any mortal handling or examining the unopened box, before placing it into the green bag. A fortiori the contents of the box with its six packages are not visible through the red bag! The fact the green bag had the abbreviation 'ATM' coupled with the fact the appellant was a member of the armed forces and worked as a store keeper where similar bags are found cannot by any stretch of imagination establish or indicative that the appellant had knowledge of the drugs found in the box.

[11] We are unanimous that the trial judge had seriously erred and misdirected himself at the close of the prosecution's case in finding that the appellant had actual knowledge of the drugs found in the box upon his arrest.

[12] We are unanimous that the learned trial judge failed to consider adequately exh D3, the caution statement of the appellant, introduced in the course of the prosecution's case and upon which caution statement no investigations were carried out by the investigating officer to ascertain the existence of Magen and Jimi referred to therein. The caution statement was made about 17 hours after the appellant's arrest. In his caution statement the appellant had stated that he had been paid to deliver *a box containing hand phone but he did not see what was inside the box*. In his caution statement he had also stated that the person who had asked him to deliver the box was Magen and that he had obtained the box from Jimi. It was recorded, inter alia, in the caution statement as follows:

S: Siapa yang menyuruh kamu dan dari mana kamu dapat kotak tersebut?

J: Orang yang menyuruh saya adalah Magen dan saya dapat kotak itu dari Jimi yang letakkan di dalam raga motor saya di depan Pizza Hut Taman Melati.

[13] We are of the view that if the caution statement had been adequately considered in the totality of the evidence at the close of the prosecution's case no reasonable person would have concluded that the appellant had actual

knowledge of the drugs inside the box in the green bag, packed in plastic packets wrapped with Chinese newspaper in six packages.

[14] An appearance of being frightened and panicky or attempting to run away, upon being suddenly pounced upon by un-uniformed persons in a popular public food outlet, is no measure of guilt or knowledge of the drugs inside the box in the red bag under the custody and control of the appellant. Such conduct is equivocal. It must be considered in the totality of the evidence. The caution statement is brief but illuminating as to the the appellant's actual knowledge, if any, of the drugs found at the time of his arrest.

[15] He had given an explanation in the statement as to why he was frightened and why he struggled when the police suddenly pounced on him and handcuffed him.

Saya meronta kerana saya takut sebab saya bawah Handphone seludup.

[16] The material parts of the caution statement read as follows:

S: Apakah yang anda hendak cakap kepada saya?

J: Pada malam itu saya diupah untuk mengambil sekotak yang berisi Handphone tetapi saya tidak melihat apa yang ada didalam kotak itu. Saya disuruh menghantar kotak tu ke Restaurant Mc Donalds Setapak. Selepas itu saya naik ke atas untuk berjumpa dengan orang yang nak terima kotak tersebut. Lepas tu orang yang saya kenali sebagai Magen dan dia meletakkan kotak tersebut disebelah tempat duduk dia saya duduk di hadapannya yang mana saya tak nampak isi kotak tu semasa Magen membukanya untuk periksanya. Jadi selepas itu dia buka kotak tu dan masuk ke dalam beg hijau askar. Lepas tu dia nak beredar dengan kotak tu dan selepas tu saya dengar jeritan Polis! Jangan bergerak, lalu dia campak kotak tu dihadapan saya dan terus lari dan polis terkam saya serta merta dan tolak saya kebawah dan gari saya dan saya cuba meronta tetapi saya digari. Saya meronta kerana saya takut sebab saya bawah Handphone seludup.

S: Siapa yang menyuruh kamu dan dari mana kamu dapat kotak tersebut?

J: Orang yang menyuruh saya adalah Magen dan saya dapat kotak tu dari Jimi yang letakkan didalam raga motor saya didepan Pizza Hut Melati.

[17] The prosecution invoked the presumption under s 37(da)(iiia) of the Act to establish trafficking as the quantity of the drugs was 200.2g. The said section reads:

37

(da) (i) ...

(ii) ...

(iii) ...

(iiia) a total of 15grammes or more in weight of heroin, morphine and monoacetylmorphines or a total of 15 grammes or more in weight of any two of the said drugs;

() ...

(xxv) otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved to be trafficking in the said drug;

[18] There was no evidence of any actual trafficking by the appellant. There was no transaction at all in the drugs by the accused at the restaurant. In the circumstances, in order to invoke the presumption of trafficking, the prosecution must establish actual possession of the said drugs.

[19] We are unanimous the prosecution had failed to adduce sufficient evidence of actual possession of the drugs. There was no evidence he had actual knowledge of the drugs. Therefore, the presumption of trafficking under s 37(da)(iiia) cannot be invoked. However, as there was prima facie evidence that the appellant had custody and control of the red bag and consequently of all the contents therein he shall be deemed to have been in possession of the drugs and shall be deemed to have known the nature of such drug until the contrary is proved, upon invoking the aid of s 37(d) of the Act.

[20] In the above circumstances, the appeal is allowed. The conviction and sentence for the offence of trafficking in dangerous drugs under s 39B of the Act by the High Court is set aside and we substitute therefor a conviction for an offence under s 12(2) of the Act, punishable under s 39A(2)Act.

[21] The amount of the drug is substantial. The appellant is sentenced to 17 years imprisonment from the date of arrest and ten strokes of the rotan.

Appeal allowed.

Reported by Kohila Nesan